104TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
1st Session } { 104–17

EXCLUSIONARY RULE REFORM ACT OF 1995

FEBRUARY 2, 1995.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. MCCOLLUM, from the Committee on the Judiciary, submitted the following

REPORT

together with

DISSENTING VIEWS

[To accompany H.R. 666]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 666) to control crime by exclusionary rule reform, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

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PURPOSE AND SUMMARY

H.R. 666, the "Exclusionary Rule Reform Act of 1995" is comprised of title VI of H.R. 3, "The Taking Back Our Streets Act of 1995." H.R. 666 would enact an exception to what is known as the "exclusionary rule" in criminal law jurisprudence.

The fourth amendment to the United States Constitution guarantees that the people have a right to be secure against "unreasonable" searches and seizures of their persons, houses, papers, and effects. Under current law, when the court finds that evidence or testimony was obtained in violation of the fourth amendment, the court, in criminal cases, applies the so-called "exclusionary rule." Application of that rule operates to prohibit the use of the challenged evidence or testimony during the government's case-in-chief at trial.

The Supreme Court first applied this judicially created rule to enforce the fourth amendment in *Weeks* v. *United States*, 232 U.S. 383 (1914). The Supreme Court later applied the rule to criminal proceedings in state courts. *Mapp* v. *Ohio*, 367 U.S. 643 (1961).

In 1984, the Supreme Court held, in *United States* v. *Leon*, 468 U.S. 897 (1984), that evidence gathered pursuant to a search warrant which was later held to be invalid could, nevertheless, be used at trial if the prosecution demonstrated that the law enforcement officers who gathered the evidence did so with an "objectively reasonable belief" that the warrant was valid at the time the evidence was gathered. The court's holding in that case is often referred to as the "good faith" exception to the exclusionary rule. The Court stated that the exclusionary rule was created to deter law enforcement officials from violating the fourth amendment. Thus, the Court held that excluding evidence gathered by government actors who in good faith believed they were acting consistently with the Constitution could serve no deterrent purpose.

H.R. 666 would both codify the holding in *Leon* and legislatively expand the "good faith" exception of that case to warrantless searches. Under H.R. 666, evidence gathered in violation of the fourth amendment by law enforcement officials with or without a warrant will be admitted at trial, as long as their actions are later determined by a court to have been "objectively reasonable" at the time. The bill would also make it clear that, except in limited circumstances, evidence will only be suppressed in federal court if it was gathered in a manner that violated the Constitution and where the good faith exception does not apply. Evidence gathered in violation of a statute, administrative rule or regulation, or rule of procedure would be admissible, as long as it was gathered in a manner consistent with the Constitution.

BACKGROUND AND NEED FOR THE LEGISLATION

HISTORY OF THE EXCLUSIONARY RULE

The fourth amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall

> issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

This right is one of the most prized rights enumerated in the Bill of rights. The scope of this amendment, and the manner of ensuring compliance with it, have been among the most controversial and vehemently contested rules of law affecting our criminal justice system. Quite plainly, the fourth amendment is the primary protection of personal privacy and security against unreasonable government intrusion.

Unlike the fifth amendment, which contains explicit exclusionary language, the fourth amendment is silent as to the manner of ensuring that its terms are honored. As a result, over time the courts have taken different actions in an effort to ensure compliance with its provisions. Prior to 1914, courts relied upon common law principles to enforce the amendment. Violations of the amendment were treated as trespass against the individual entitling a victim to petition the court for the return of the improperly seized evidence and to sue the violator for monetary damages. After 1914, however, the manner of enforcing the amendment was through the application of the "exclusionary rule."

The Supreme Court first used this judicially-created rule of evidence to enforce the fourth amendment in *Weeks* v. *United States,* 232 U.S. 383 (1914). In *Weeks,* the Court held that evidence owned by the defendant which was gathered in violation of the amendment could not be introduced at the trial of the defendant. Over time, the Court expanded the holding in *Weeks* to eliminate the requirement that the defendant actually own the evidence. In *Mapp* v. *Ohio,* 367 U.S. 643 (1961), all the Court required before suppressing the seized evidence, was that the defendant had a reasonable expectation of privacy in the evidence illegally seized. Through that same case, the Court applied the rule in state criminal proceedings, as well. *Mapp* v. *Ohio,* 367 U.S. 643 (1961).

Throughout its history the exclusionary rule has proved controversial, principally due to the fact that its application always suppresses highly probative and reliable evidence of a defendant's guilt. In short, application of the rule often means that "the criminal is to go free because the constable has blundered." *People* v. *Defore,* 242 N.Y. 13, 21, *cert. denied* 270 U.S. 657 (1926) (Cardozo, J.).

In light of the significant social cost that results from excluding evidence of a defendant's guilt, the Supreme Court has steadily narrowed the application of the rule since the *Mapp* decision. For example, the Court has held that the fourth amendment right is personal and thus evidence obtained illegally against one defendant may be used against another person. *Alderman* v. *United States,* 394 U.S. 165 (1969) (allowing use of unconstitutionally obtained evidence against co-conspirators). The illegally seized evidence may also be used in grand jury proceedings. *United States* v. *Calandra,* 414 U.S. 338 (1974). In fact, it is now settled law that evidence gathered in violation of the fourth amendment can only be suppressed in criminal proceedings. *United States* v. *Janis,* 428 U.S. 433 (1976) (such evidence may be used in civil proceedings); *Immigration and Naturalization Service* v. *Lopez-Mendoza,* 468 U.S.

1032 (1984) (such evidence may be used in deportation proceedings). Finally, the Court has also held that evidence seized in violation of the fourth amendment may be used in criminal trials to impeach the testimony of the defendant. *Walder* v. *United States,* 347 U.S. 62 (1954) (use to rebut direct testimony); *United States* v. *Havens,* 446 U.S. 620 (1980) (use on cross-examination).

JUSTIFICATIONS ADVANCED FOR THE USE OF THE RULE

Three justifications for the use of the rule have been offered at differing points in the history of the rule. In 1928, Justice Brandeis, in a dissenting opinion, first asserted that application of the rule was necessary to maintain judicial integrity. *Olmstead* v. *United States,* 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting). He believed that if courts allowed people to be convicted on the basis of improperly obtained evidence those courts would, in effect, become accomplices to the government's misconduct, thus ratifying the illegal act.

In *Mapp,* the Court's plurality held that the exclusionary rule was an essential part of the right to privacy inherent in the language of the fourth, fifth, and fourteenth amendments to the Constitution. In that decision, the Court held that application of the rule was required by the fourth amendment in order to prevent any additional invasion of privacy resulting from the use of unconstitutionally obtained evidence.

Shortly after that decision, however, the Court began to back away from the notion that either of these rationales support the application of the rule. In 1965, the Court noted that "the ruptured privacy of the victims' homes and effects cannot be restored" by the means of the exclusionary rule because "reparation comes too late." *Linkletter* v. *Walker,* 381 U.S. 618 (1965).

In *United States* v. *Calandra,* the Court provided a third rationale for the rule. There, the Court stated that the rule is a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." 414 U.S. at 348. In *Stone* v. *Powell,* 428 U.S. 465 (1976) the Court further eroded the judicial integrity rationale stating that "this concern has limited force as a justification for the exclusion of highly probative evidence." 428 U.S. at 485. Finally, in *United States* v. *Leon,* 468 U.S. 986 (1984), the Court folded the judicial integrity rationale into the deterrence rationale. The Court stated, "Our cases establish that the question whether the use of illegally obtained evidence in judicial proceedings represents judicial participation in a Fourth Amendment violation and offends the integrity of the courts 'is essentially the same as the inquiry into whether the exclusion would serve a deterrent purpose.'" 468 U.S. at 921, n.22 (quoting *United States* v. *Janis,* 428 U.S. at 459, n.35).

THE LEON "GOOD FAITH" EXCEPTION TO THE RULE

In *Leon,* police gathered evidence pursuant to a search warrant which had been issued by a neutral and detached magistrate but which later was held to have been invalid. The Court held that application of the exclusionary rule was not appropriate in that case

because the police officers had acted in a reasonably objective belief that their conduct did not violate the fourth amendment.

The Court noted that "[t]he substantial social costs exacted by the exclusionary rule for the vindication of Fourth Amendment rights had long been a source of concern." 468 U.S. at 907. It pointed out: "[o]ur cases have consistently recognized that unbending application of the exclusionary sanction to enforce the ideals of governmental rectitude would impede unacceptably the truth-finding functions of judge and jury.'" Id. (quoting *United States* v. *Payner*, 447 U.S. 727, 734 (1980). The Court pointed out that "[t]he Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands, and an examination of its origin and purposes makes clear that the use of fruits of a past unlawful search or seizure 'work[s] no new Fourth Amendment wrongs.'" 468 U.S. at 906 (quoting *United States* v. *Calandra*, 414 U.S. at 354). It held that the appropriateness of using the exclusionary rule was dependent on "weighing the costs and benefits" of withholding reliable evidence from the truth-seeking process. 468 U.S. at 907. In light of that standard, the Court suggested that "when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system." 468 U.S. at 907–08 (quoting *Stone* v. *Powell*, 428 U.S. at 490).

Later in its opinion, the Court noted that the rule "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." As the court reasoned, "where an officer's conduct is objectively reasonable, excluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that * * * the officer is acting as a reasonable officer would and should under the circumstances. Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty.'" 468 U.S. at 919–20 (quoting *Stone* v. *Powell*, 428 U.S. at 539–40 (White, J., dissenting)).

Following the *Leon* holding, the Court further limited the use of the exclusionary rule by recognizing an additional *Leon*-type exception. In *Illinois* v. *Krull*, 480 U.S. 340 (1987), the Court held that the exclusionary rule should not be applied to illegally obtained evidence law enforcement officers reasonably rely on a statute authorizing them to conduct a search.

In *Leon* the Court characterized its holding as a "good faith" exception to the exclusionary rule. 468 U.S. at 924. In fact, however, the label is a misnomer. The subjective good faith of the government actor is not determinative of the issue as to whether his or her conduct was objectively reasonable under the circumstances at the time the evidence was gathered. While subjective intent may be an element that courts should consider in determining reasonableness, the holding in *Leon* turns on whether the government actors gathered the evidence at issue in an objectively reasonable belief that their actions did not violate the fourth amendment. H.R. 666 would legislatively limit the use of the exclusionary rule in a manner consistent with the *Leon* "objective reasonableness" philosophy.

THE REACH OF H.R. 666

H.R. 666 is intended to accomplish two broad purposes. First, it codifies the *Leon* holding for cases where evidence is wrongfully gathered pursuant to a facially valid warrant. Second, it extends the holding in that case to situations where government actors gather evidence without a warrant but under circumstances justifying an objectively reasonable belief that their actions were proper. Both purposes are based on the underlying proposal that the exclusionary rule should not be applied to cases where no deterrence is likely to result.

In noting the lack of any deterrent effect by applying the exclusionary rule to objectively reasonable police conduct, the Court stated that ''this is particularly true, we believe, when an officer acting with objectively reasonable good faith has obtained a search warrant from a judge or magistrate and is acting within its scope.'' 468 U.S. at 920. While it may be ''particularly true'' in those situations, the Committee believes that it is also true in other situations where police or other government actors gather evidence in the objectively reasonable belief that their conduct is proper. In fact, the Supreme Court, itself, has recognized the legitimacy of warrantless searches in limited situations such as those involving automobiles, exigent circumstances, inventories, objects in plain view, pat down searches of persons lawfully detained, searches incident to an arrest, and where the evidence would have been inevitably discovered had a warrant been obtained.

Notwithstanding the Court's allowances in those and other reasonable situations, the Committee is aware of cases where government actors gathered evidence without a warrant but with an objectively reasonable belief that their actions did not violate the fourth amendment, where a court excluded that evidence from trial because the evidence had not been gathered pursuant to a warrant. The Committee believes that in these situations there is no deterrent effect achieved by applying the exclusionary rule when the law enforcement officers believed their actions were consistent with the fourth amendment. Thus, H.R. 666 will preclude application of the rule in all situations where government actors gathered evidence in a manner that violates the fourth amendment but yet did so in the objectively reasonable belief that they were acting in accord with that amendment, regardless of whether a search warrant had been issued.

The Committee has also become aware of cases where the exclusionary rule has been used to exclude evidence that was gathered in violation of a statute, administrative rule, or regulation, or rule of procedure, but where no constitutional violation of any type occurred. The Committee believes that in light of the extreme social cost resulting from the application of the exclusionary rule, the rule should only apply to evidence gathered in violation of the Constitution. Consequently, H.R. 666 will prohibit the application of the exclusionary rule to evidence gathered in violation of a statute, administrative rule, regulations, or rule of procedure. This bill does, however, contain an exception to that prohibition when a statute or rule of procedure expressly authorizes exclusion.

The bill provides that in the event a statute or rule of procedure authorizes exclusion, the evidence is not to be excluded if the government actors gathering the evidence did so in the objectively reasonable belief that they were acting properly. In essence, the bill creates an "objective reasonableness" exception to this application of the exclusionary rule as well.

Finally, the bill specifies that evidence gathered pursuant to and within the scope of a warrant constitutes prima facie evidence of the existence of objective reasonableness. As the Supreme Court stated in *Leon*, "'a warrant issued by a magistrate normally suffices to establish' that the law enforcement officer has 'acted in good faith in conducting the search.'" 468 U.S. at 922 (quoting *United States* v. *Ross*, 456 U.S. 789, 823, n.32 (1982). H.R. 666 codifies this presumption and places the burden squarely upon the defendant to overcome the presumption by proving, by a preponderance of the evidence, that the government actors who gathered the evidence pursuant to the warrant were not acting in an objectively reasonable belief that their actions were constitutional.

HEARINGS

The Committee's Subcommittee on Crime held two days of hearings on H.R. 3 on January 19 and 20, 1995. The text of H.R. 666 is substantially identical to Title VI of H.R. 3. Testimony specifically related to H.R. 666 was received from two witnesses, Paul J. Larkin, Jr., Esq., former Assistant to the Solicitor General of the United States, on behalf of himself; and E. Michael McCann, Esq., Chairman of the Criminal Law Section of the American Bar Association, on behalf of the ABA, with no addition material submitted.

COMMITTEE CONSIDERATION

On January 27, 1995, the Committee met in open session and ordered reported the bill H.R. 666, without amendment, by a recorded vote of 19 to 14, a quorum being present.

VOTE OF THE COMMITTEE

The committee then considered the following amendments, none of which was adopted.

1. An amendment by Mr. Reed to limit the scope of H.R. 666 to searches and seizures conducted pursuant to and within the scope of a warrant. The amendment was defeated by a 13–21 rollcall vote.

ROLL CALL NO. 1

AYES	NAYS
Mr. Conyers	Mr. Hyde
Mrs. Schroeder	Mr. Moorhead
Mr. Schumer	Mr. Sensenbrenner
Mr. Berman	Mr. McCollum
Mr. Boucher	Mr. Gekas
Mr. Bryant (TX)	Mr. Coble
Mr. Reed	Mr. Smith (TX)
Mr. Nadler	Mr. Schiff

Mr. Scott	Mr. Canady
Mr. Becerra	Mr. Inglis
Mr. Serrano	Mr. Goodlatte
Ms. Lofgren	Mr. Buyer
Ms. Jackson-Lee	Mr. Hoke
	Mr. Bono
	Mr. Heineman
	Mr. Bryant (TN)
	Mr. Chabot
	Mr. Flanagan
	Mr. Barr
	Mr. Frank
	Mr. Watt

2. An amendment by Mr. Watt. The Watt amendment would have inserted the text of the fourth amendment to the United States Constitution as substantially all of the text of the bill. The Watt amendment was defeated by a 12–21 rollcall vote.

ROLL CALL NO. 2

AYES	NAYS
Mr. Conyers	Mr. Hyde
Mrs. Schroeder	Mr. Moorhead
Mr. Berman	Mr. Sensenbrenner
Mr. Bryant (TX)	Mr. McCollum
Mr. Reed	Mr. Coble
Mr. Nadler	Mr. Smith (TX)
Mr. Scott	Mr. Gallegly
Mr. Watt	Mr. Canady
Mr. Becerra	Mr. Inglis
Mr. Serrano	Mr. Goodlatte
Ms. Lofgren	Mr. Buyer
Ms. Jackson-Lee	Mr. Hoke
	Mr. Bono
	Mr. Heineman
	Mr. Bryant (TN)
	Mr. Chabot
	Mr. Flanagan
	Mr. Barr
	Mr. Frank
	Mr. Schumer
	Mr. Boucher

3. Final passage. Mr. Hyde moved to report H.R. 666 favorably to the whole House. The resolution was adopted by a rollcall vote of 19–14.

ROLL CALL NO. 3

AYES	NAYS
Mr. Hyde	Mr. Conyers
Mr. Moorhead	Mrs. Schroeder
Mr. Sensenbrenner	Mr. Schumer
Mr. McCollum	Mr. Berman
Mr. Coble	Mr. Boucher

Mr. Smith (TX)
Mr. Gallegly
Mr. Canady
Mr. Inglis
Mr. Goodlatte
Mr. Buyer
Mr. Hoke
Mr. Bono
Mr. Heineman
Mr. Bryant (TN)
Mr. Chabot
Mr. Flanagan
Mr. Barr
Mr. Frank
Mr. Bryant (TX)
Mr. Reed
Mr. Nadler
Mr. Scott
Mr. Watt
Mr. Becerra
Mr. Serrano
Ms. Lofgren
Ms. Jackson-Lee

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT FINDINGS

No findings or recommendations of the Committee on Government Reform and Oversight were received as referred to in clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 2(l)(3)(B) of House Rule XI is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 2(l)(C)(3) of rule XI of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 666, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, February 1, 1995.

Hon. HENRY J. HYDE,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 666, the Exclusionary Rule Reform Act of 1995, as ordered reported by the House Committee on the Judiciary on January 27, 1995. CBO estimates that enacting H.R. 666 would not result in any significant cost to the federal government. Because en-

actment of H.R. 666 would not affect direct spending or receipts, pay-as-you-go procedures would not apply to the bill.

This bill would prohibit federal courts from excluding certain evidence obtained in warrantless searches if the law enforcement officials who conducted the search had an "objectively reasonable belief" that the search was legal under the Fourth Amendment. Because CBO expects that this bill could enable the Justice Department to prosecute certain criminal cases that would otherwise be excluded from initial or full prosecution for lack of evidence, enacting H.R. 666 could impose additional costs on federal prosecutors and the federal court system. On the other hand, the bill could reduce the number of appeals that are currently filed to dispute the exclusion of certain evidence, and thus allow cases to move forward in a more timely fashion. Based on information from the Administrative Office of the United States Courts, CBO does not expect any resulting change in caseload or court costs to be significant. Any increase in costs would be subject to the availability of appropriated funds.

H.R. 666 would not affect the proceedings of state courts, and thus would have no budgetary impact on state or local governments.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Susanne S. Mehlman.

Sincerely,

ROBERT D. REISCHAUER, *Director.*

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the Committee estimates that H.R. 666 will have no significant inflationary impact on prices and costs in the national economy.

SECTION-BY-SECTION ANALYSIS

Sec. 101. Short title

This section states the short title of the bill as the "Exclusionary Rule Reform Act of 1995."

Sec. 102. Admissibility of certain evidence

This section amends Title 18 of the United States Code to add new section 3510 governing the admissibility of certain evidence obtained by search or seizure.

Specifically, subsection (a) of new section 3510 provides that evidence obtained as the result of a search or seizure that allegedly violated the fourth amendment to the United States Constitution nevertheless will be admissible in any proceeding in a court of the United States, so long as the government actors gathering the evidence did so in circumstances justifying an objectively reasonably belief that their actions were in conformity with the requirements of the fourth amendment. This subsection, in part, codifies the holding of the United States Supreme Court in *United States* v. *Leon,* 468 U.S. 897 (1984).

The new subsection also extends the holding of the *Leon* case to situations where law enforcement officials conduct searches or sei-

zures without a warrant but with the objectively reasonable belief that their actions did not violate the fourth amendment. Thus, regardless of the existence of a warrant, evidence obtained in a manner that otherwise might violate the fourth amendment will be admissible in a proceeding in a court of the United States if the search or seizure was carried out in circumstances justifying an objectively reasonable belief that the search or seizure was conducted in conformity with the fourth amendment.

The court, not the jury, is to determine whether the search or seizure was carried out in circumstances justifying an objectively reasonable belief that it was in conformity with the fourth amendment. The statute provides, however, that evidence gathered pursuant to and within the scope of a warrant constitutes prima facie evidence of the existence of those circumstances. In those cases, the defendant will have the burden of proving, by a preponderance of the evidence, that the government actors gathering the evidence could not have been acting in the objectively reasonable belief that their actions were consistent with the fourth amendment.

The Committee emphasizes that the "objectively reasonable" test is not a subjective inquiry into the state of mind of the government actors who carried out the search or seizure. Although the state of mind of those persons is one factor that the court should consider in determining objective reasonableness, the Court will inquire of the objective facts of the search situation to determine the reasonableness of the officers' actions. The better view of the test is that it is an objective examination of the facts and circumstances that were either apparent to the government actors at the time the evidence was gathered or which could have been ascertained by the exercise of reasonable diligence and whether, in light of those facts and circumstances, those persons could reasonably have believed their conduct was consistent with the fourth amendment. While intentional violations of the Constitution should never be deemed objectively reasonable, it is also not the Committee's intention that government actors, in order to meet the objective reasonableness standard, be required to go to extreme lengths in uncovering unknown facts or circumstances that might have a bearing on their decision to gather the evidence in question. On the other hand, the courts should not allow government actors to ignore or dismiss facts and circumstances of which they are aware or can readily observe in deciding how, when, and where to conduct searches and seizures.

As stated, new subsection (a) applies to all situations where government officials gather evidence, whether pursuant to a warrant or not. The Committee is quick to note, however, that situations where a warrantless search should be deemed to be reasonable will seldom, if ever, include those situations where the Supreme Court has expressly held that a warrant is required. Nothing in this bill is intended to overturn existing Supreme Court decisions that interpret the fourth amendment. Government officials are charged with understanding the holdings in these cases and acting in conformity with them. The Committee doubts that any failure to act in accordance with the prior decisions of the Supreme Court on fourth amendment issues could be deemed to be objectively reasonable.

Section 102 of the bill also adds new subsection (b)(1) of section 3510 in order to make it clear that the exclusionary rule is applicable only to evidence gathered in violation of the fourth amendment, and then only if it was gathered in a manner that was not objectively reasonable under the circumstances. This portion of section 102 thus precludes use of the exclusionary rule with respect to evidence gathered in violation of a statute, administrative rule or regulation, or rule of procedure unless a statute or rule of procedure specifically authorizes exclusion of the evidence. The statute or rule of procedure authorizing exclusion of the evidence need not be the statute or rule violated; it may be a separate statute or rule of procedure. Exclusion may not be authorized by an administrative rule or regulation.

The bill also adds new subsection (b)(2) of section 3510 which provides that the fact that a statute or rule of procedure authorizes application of the exclusionary rule does not end the inquiry. Even if exclusion if authorized, the court is nevertheless prohibited from excluding the evidence if the government actors who gathered the evidence did so in circumstances justifying the objectively reasonable belief that their actions did not violate the statute, administrative rule or regulation, or rule of procedure in question. In essence, this section applies a "good faith" or "objective reasonableness" exception to the use of the exclusionary rule with respect to this type of evidence as well.

Finally, section 102 adds new subsection (c) to section 3510 in order to emphasize the fact that section 3510 is not to be construed to require or authorize the exclusion of evidence in any proceeding.

AGENCY VIEWS

The committee received a letter from the U.S. Department of Justice providing Administration views on H.R. 3, the "Taking Back Our Streets Act of 1995." This letter addressed the issues presented in H.R. 666 in pertinent part as follows:

VI. EXCLUSIONARY RULE REFORM

> Title VI creates an exception to the search-and-seizure exclusionary rule by providing that evidence is not subject to suppression on fourth amendment grounds if it was obtained in circumstances justifying an objectively reasonable belief that the search or seizure was in conformity with the fourth amendment. The title also prohibits the creation of exclusionary rules based on non-constitutional violations, except by statute or by rules promulgated by the Supreme Court.
>
> The House of Representatives has previously passed the same or similar reforms on a number of occasions, most recently in section 1720 of H.R. 3371 of the 102d Congress, and the Senate passed a similar provision in S. 1764 of the 98th Congress. In *United States* v. *Leon,* 468 U.S. 897 (1984), the Supreme Court held that evidence is not subject to suppression of obtained in objectively reasonable reliance on a warrant, and the "objective reasonableness" standard is applied in determining the personal liability of

officers in *Bivens* actions and section 1983 suits, in both warrant and non-warrant cases.

The federal courts in the Fifth and Eleventh Circuits have gone further, and have applied a "reasonableness" standard in ruling on the suppression of evidence, in both warrant and non-warrant cases, following the decision in *United States* v. *Williams*, 622 F. 2d 830 (5th Cir. 1980). However, this is a minority position, which has not been adopted by most courts or state legislatures.

The caselaw in the Fifth and Eleventh Circuits does not show a large number of reported decisions applying the broader "reasonableness" exception for non-warrant cases, which suggests that proponents of this type of legislative reform overestimate its value to law enforcement. In most cases in which a court could find officers' conduct to be objectively reasonable, the court would find in any event that there was no fourth amendment violation.

The prevailing approach of recognizing a "reasonableness" exception for warrant cases only provides the strongest incentive for officers to obtain warrants before carrying out searches and seizures. We support an exclusionary rule exception in such cases because it insures that guilty criminals do not escape punishment—without undermining the goal of encouraging police officers to obtain search warrants before abridging personal freedoms. By contrast, a "reasonableness" exception for non-warrant cases would reduce the relative advantage of the practice of seeking a warrant whenever it is feasible to do so.

Hence, we believe that it would be unwarranted to attempt to resolve this issue legislatively, in the direction of narrowing the exclusionary rule's application. We believe that ensuring the permanence of the *Leon* exception for warrant cases through a statutory codification is a preferable alternative, if Congress believes that legislation in this area is desirable.

We do support the feature of this proposal that limits the creation of exclusionary rules based on non-constitutional violations. Because of the importance of the truth-finding functions in litigation, and particularly in criminal proceedings, it is reasonable to require Congress (or the Supreme Court) to indicate affirmatively when it wishes courts to apply an exclusionary rule sanction for statutory or rule violations that do not infringe upon the constitutional rights of the defendant.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 18, UNITED STATES CODE

* * * * * * *

CHAPTER 223—WITNESSES AND EVIDENCE

* * * * * * *

§ 3510. Admissibility of evidence obtained by search or seizure

(a) EVIDENCE OBTAINED BY OBJECTIVELY REASONABLE SEARCH OR SEIZURE.—Evidence which is obtained as a result of a search or seizure shall not be excluded in a proceeding in a court of the United States on the ground that the search or seizure was in violation of the fourth amendment to the Constitution of the United States, if the search or seizure was carried out in circumstances justifying an objectively reasonable belief that it was in conformity with the fourth amendment. The fact that evidence was obtained pursuant to and within the scope of a warrant constitutes prima facie evidence of the existence of such circumstances.

(b) EVIDENCE NOT EXCLUDABLE BY STATUTE OR RULE.—

(1) GENERALLY.—Evidence shall not be excluded in a proceeding in a court of the United States on the ground that it was obtained in violation of a statute, an administrative rule or regulation, or a rule of procedure unless exclusion is expressly authorized by statute or by a rule prescribed by the Supreme Court pursuant to statutory authority.

(2) SPECIAL RULE RELATING TO OBJECTIVELY REASONABLE SEARCHES AND SEIZURES.—Evidence which is otherwise excludable under paragraph (1) shall not be excluded if the search or seizure was carried out in circumstances justifying an objectively reasonable belief that the search or seizure was in conformity with the statute, administrative rule or regulation, or rule of procedure, the violation of which occasioned its being excludable.

(c) RULE OF CONSTRUCTION.—This section shall not be construed to require or authorize the exclusion of evidence in any proceeding.

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DISSENTING VIEWS

We strongly dissent from the majority's opinion. In their zeal to rush through their "Contract with America", the Republican majority has embraced a number of provisions that may benignly be called either wrongheaded or simplistic. But finally, in its embrace of H.R. 666, the so-called "Exclusionary Rule Reform Act of 1995", they have now succeeded in committing affirmative harm to the Constitution. And in keeping this provision of the "Contract with America", they have broken our Constitution's higher covenant with the people maintained for over 200 years.

Simply stated, H.R. 666 ends the Fourth Amendment as we know it by eviscerating the warrant requirement that the American colonists demanded from the Framers following their experience with British occupation. That starting point may seem like a quaint vestige from a far-away past, but when that vestige is retranslated into recently documented abuses of enforcement officers—whether the FBI, the BATF, or local police, occurring not just in our large urban centers but in rural communities in Idaho and Texas—then the right of all Americans to be protected from arbitrary and unfounded invasions of their homes becomes much more than a historical remembrance.

Plainly stated, what the framers of the Fourth Amendment attempted to do was to place a check on the unfettered authority of the state from having the authority without probable cause to invade people's homes on a pretext of searching for property or papers that had not been tied to the likely commission of a crime. Without the requirement that a search of private property have a nexus to both criminal conduct and to an external authority (judge or magistrate), a soldier, a federal agent, or a policeman, could take unto himself the right to execute what was called in the colonies a "general warrant", which permitted a search of a home for "whatever" evidence that might be found.

Lost in the Judiciary Committee's adoption of this bill is the basic axiom of the Fourth Amendment: that it serves to protect citizens against unreasonable governmental searches and seizures. The Fourth Amendment of the Constitution reads simply:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Since *United States* v. *Weeks*, 232 U.S. 384 (1914), the mandates of the Fourth Amendment have been enforced through the application of an exclusionary rule. That rule forbids the introduction into evidence at a criminal trial of items found as a result of an illegal

search or seizure. Since 1961, the exclusionary rule has applied not only in the Federal courts but also in every state or local court in which defendants stand accused of crime. During all those years, Congress has never spoken on the wisdom of the exclusionary rule but instead allowed the judiciary to develop its standards to judge the rule—as well as its very visible exceptions—as procedural safeguards for the Fourth Amendment. Such procedural safeguards are indeed necessary because the constitutional protections are never self-enforcing. In numerous cases, the Supreme Court, the ultimate arbiter of our constitutional rights, has held precisely that: that the exclusionary rule is required to enforce the protections of the Fourth Amendment. To do otherwise, as the Court observed in the seminal case of *Mapp* v. *Ohio* would be "to permit that right [ensured in the Fourth Amendment] to remain an empty promise."

Comes now the Contract with America with its own promise to make the Fourth Amendment an empty promise. We do not find that to be a reasonable tradeoff. Moreover, lost on the majority in its passage of H.R. 666 is the fundamental issue of whether Congress even has the power to lessen the requirements of the exclusionary rule as mandated by the Constitution. While the majority evidently does not wish to address the question directly, it would be difficult for anyone but the purest polemicist to contend that if, in fact, the exclusionary rule is a constitutional requirement, then Congress has the power to change it by simple legislation rather than by a constitutional amendment. Even though the Contract with America offers up a panoply of other constitutional amendments, for some reason in lacerating the Fourth Amendment the Contract proposes a statutory change and frames the issue around whether the exclusionary rule serves or does not serve other interests.

What is inescapable is that the decision in *Mapp* v. *Ohio* clearly applied the exclusionary rule to the States. Prior to *Mapp,* it might have been argued that the Supreme Court in requiring the exclusion of illegally seized evidence in Federal courts was simply exercising its supervisory powers over the inferior Article III tribunals. But that argument evaporated with the *Mapp* decision; for the Supreme Court has no supervisory power over state courts. The power to extend the exclusionary rule to state courts could have only derived from the due process clause of the Fourteenth Amendment, and as such, the exclusionary rule must be viewed as a constitutional requirement.

Let us be clear: the majority refuses to acknowledge that the exclusionary rule has undergone continuing scrutiny and refinement in the federal judiciary. If the problem being identified by the proponents of this legislation is whether our policemen are being hamstrung in discharging their duties, then the majority should acknowledge that this concern has been well attended to by the Supreme Court—the Burger and Rehnquist Courts—as a viable factor in making the exclusionary rule work. But where H.R. 666 strays beyond concern for effective law enforcement to seeking the dangerous goal of eradicating the warrant requirement entirely is by permitting law enforcement officers to exercise his or her own judgment about "probable cause" being found for a search without first

consulting an external source of authority to validate or invalidate that impulse.[1]

Beginning with *United States* v. *Leon*, 468 U.S. 897 (1984), the Supreme Court formally adopted a "good faith" exception to the Fourth Amendment exclusionary rule. In *Leon,* the Court ruled that evidence seized in reasonable "good faith" reliance on a search warrant subsequently found to be defective would be admissible provided that the officer's reliance is objectively reasonable. The key phrase here is, of course, the officer's "reliance" on the judgment of an external authority (a member of another branch of government)—namely, the "judiciary", which has always been presumed to be a "neutral and detached" party. Id at 914. *Leon* thus gave police officers needed latitude to discharge their duties in a good faith manner—without severing all ties to a "reality check" in the form of a judge or magistrate.

The same type of "good faith" reliance by an officer on external authority for permission to search or seize was further developed in the subsequent cases of *Illinois* v. *Krull,* 480 U.S. 340 (1987); and *Illinois* v. *Rodriguez,* 497 U.S. 177 (1990). That the good faith exception is alive and well can be observed in the wide parameters most recently established in *Krull.* There, the question the Supreme Court faced was whether the good faith exception could even extend to a situation where an officer's reliance on the constitutionality of a statute appears objectively reasonable but that the statute is subsequently declared unconstitutional. The Supreme Court ruled that such evidence was permissible.

In *Krull,* Justice O'Connor, among others, began to warn that the court may have begun to reach the outer limits of the good-faith exception. Perceptively, she warned that legislators—not wanting to be perceived "as soft on crime"—might well pass a statute that went well beyond permissible police search and seizure powers. In that case, the statute would be the sole guidepost for permissible police conduct until a case could challenge such an unconstitutional grant of authority.

But even as recently as seven years ago, Justice O'Connor underestimated the fierce forces driving certain legislators not to be perceived as "soft on crime." For in H.R. 666, *Krull* is left far behind. In H.R. 666, there is found no requirement of reliance by an enforcement official on some warrant issued by a judge, or even by some impermissibly broad statute passed by a legislature. There is only the officer's own determination that "probable cause" exists to invade a person's home or property.

The proponents of H.R. 666 have never revealed why the Supreme Court jurisprudence on the good-faith exception is unacceptable. They merely claim that police are being hamstrung; that criminals are being released in droves because of "technical" violations of evidentiary rules. No empirical evidence is cited in support of such inflammatory and graphic rhetoric. But in the single hearing held debating the warrant requirement from the Constitution, contrary evidence was offered by criminal justice officials—and not

[1] It should be noted that the need for a warrant is already dispensed with in other law enforcement exigencies where because of direct observation, law enforcement officials believe the commission of criminal conduct is likely and imminent. The so-called plain-view doctrine is accepted law and a valuable tool to law enforcement officials everywhere.

by prison inmates convicted of repeat, violent offenses, as the proponents would have one believe. For example, a General Accounting Office report of 38 U.S. Attorney's offices which found that defendants raise the exclusionary rule in only 1.3% of the cases and, even here, more than 50% of the defendants were convicted anyway.[2]

E. Michael McCann, the District Attorney for Milwaukee County, who said he has prosecuted and "put tens of thousands of persons behind bars" testified at a hearing of the Subcommittee on Crime that:

> * * * if I felt the exclusionary rule was impairing [or] impacting negatively on my prosecutions, I would not be here supporting the exclusionary rule. * * * If I felt I had been handcuffed, which is an expression you will occasionally hear, or deterred from enforcement, I would be candid about it.[3]

District Attorney McCann then described how he believed police officers would interpret the change in the exclusionary rule:

> If I was educating police officers, if this rule is adopted, I would say to them * * *, here is the constitutional law. You shouldn't go beyond this but I will tell you what the courts are doing. They are permitting evidence that goes beyond the Constitution. They are permitting evidence if you are acting on objectively reasonable belief.
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> And an officer, then, saying, should I go into that house, do I have the grounds, would think, what does the Constitution say and then what goes beyond the Constitution? * * *
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> And he [the police officer] says, I know this is unconstitutional. I [also] know from prior experience in the narcotics courts, the judges have said this constitutes reasonable belief. I am going to act on it even though I know it is unconstitutional.[4]

Thus, the exclusionary rule protects the very integrity of the criminal justice system by requiring law enforcement to articulate to the judiciary the factors indicating the existence of probable cause. By so doing, the rule encourages careful police work that will help build the prosecution case at trial.

The Republican majority must be given great credit for one thing: succeeding, temporarily, in eclipsing the debate in the judiciary over whether the *Leon-Krull-Rodriguez* line of cases has taken the "good faith" exception beyond the outer bounds of permissible constitutional requirements. By leaping to another constitutional solar system entirely where there is no judiciary but only FBI and BATF agents breaking into homes of private citizens, the legislation has attempted to denigrate the real and continuing legal de-

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[2] General Accounting Office, "Impact of the Exclusionary Rule on Federal Criminal prosecutions," Report No. CDG–79–45 (Apr. 19, 1979). See also, Thomas Y. Davies, "A Hard Look at What We Know (and still need to learn) About the 'Costs' of the Exclusionary Rule," American Bar Association (1983) (non-prosecution or non-conviction resulting from illegal searches is in the range of 0.6% to 2.35% of all adult felony arrests.)

[3] Testimony of E. Michael McCann, before the Subcommittee on Crime, January 20, 1995, at page 12–13.

[4] McCann at page 27.

bate over the exclusionary rule to an arcane dialogue among constitutional scholars, federal judges, law professors and the defense bar while Congress takes decisive action. But that debate is precisely what is needed to shape well-reasoned and sound constitutional requirements, as adopted to life in the 21st Century, and not just in the 18th Century.

There is another area obscured by the arguments presented by the majority: that the exclusionary rule was not put in place as a procedural safeguard to select which class of guilty defendants should go free; rather, it was instituted to protect the innocent who were subjected to illegal search and seizures.[5]

The Constitution is inherently a "conservative" document by safeguard unto individuals rights and liberties that cannot be taken away by the State without due process of law. In that light, H.R. 666 is not a "conservative" effort to refine the exclusionary rule within constitutional bounds. It is a cartoon-like enterprise, aimed at eliciting instant visceral responses, and all the while promoting a disturbing subtextual current of race and big-city crime underneath its surface.

Submerged in this effort for now is how average Americans all across this country would be affected if H.R. 666 were to become law even for a short period before being struck down as unconstitutional. There is a strong reason why the Constitution sets up high barriers to the government breaking into private citizens' homes, or capriciously seeking to exercise its "taking power" of private property without adequate compensation. It should be remembered: the life of the "Contract with America" expired in a hundred days. It is now up to the full House, the Senate, the President and the federal judiciary to ensure that this 100 days is not permitted to do lasting damage to the Fourth Amendment of the Constitution, which has lasted a good bit longer than 100 days.

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[5] Congressman Scott pursued this important line of inquiry when he asked District Attorney McCann (transcript at pp. 31–32) if there was any remedy other than the exclusionary rule for people whose Fourth Amendment rights may have been violated:

"Mr. SCOTT. Could you say a little bit more about how this rule affects innocent people? Is there any other way of keeping officers out of illegal searches of innocent people other than the exclusionary rule? Mr. Larkin has suggested suing the officer. Have you seen any success in that area?

"Mr. MCCANN. No, there is not. And, by the way, you asked—civilly, no. They are not going to get much in damages if they bothered to sue.

"Mr. SCOTT. If I drive a Florida rental car up [Interstate] 95 and get stopped because I am black, there is just no remedy.

"Mr. MCCANN. No remedy, sir. Realistically, none.

"Mr. SCOTT. And the exclusionary rule is the only thing that prevents the police officers from doing that because if they found cocaine in my car, they couldn't use it anyway?

"Mr. MCCANN. That is basically the rule.

"Mr. SCOTT. That is what keeps them out of my car as an innocent person going up 95 driving a Florida rental car.

"Mr. MCCANN. That is right, sir. I do want to say, about ten years ago * * * I did an exhaustive search to see if there was anywhere I could find an officer criminally prosecuted for maliciously, deliberately, unconstitutionally searching a citizen. I could find no criminal prosecution in the United States for that. Not one in the United States."

For all these reasons, I [we] strongly dissent.

JOHN CONYERS, Jr.
HOWARD L. BERMAN.
PAT SCHROEDER.
JACK REED.
JERROLD NADLER.
SHEILA JACKSON-LEE.
BOBBY SCOTT.
JOSÉ E. SERRANO.
MELVIN L. WATT.
ZOE LOFGREN.

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